

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

STATUTORY REVIEW OF THE SYSTEM FOR
REGULATING RATES AND CLASSES FOR
MARKET-DOMINANT PRODUCTS

Docket No. RM2017-3

**RESPONSE OF THE UNITED STATES POSTAL SERVICE TO
MOTION OF THE ASSOCIATION FOR POSTAL COMMERCE, ALLIANCE OF
NONPROFIT MAILERS, AND MPA—ASSOCIATION OF MAGAZINE MEDIA
FOR EARLY TERMINATION OF NON-PUBLIC STATUS OF
TWO DOCUMENTS FILED UNDER SEAL
(March 23, 2018)**

On March 16, 2018, the Association for Postal Commerce, Alliance of Nonprofit Mailers, and MPA—the Association of Magazine Media (collectively “PostCom *et al.*”), asked the Commission to terminate the non-public status of Appendix A to the Postal Service’s Initial Comments filed under seal on March 1, 2018 and Appendix G to the Postal Service’s Comments filed under seal on March 20, 2017.¹ Pursuant to 39 C.F.R. § 3007.31(b), the Postal Service files this response in opposition to the PostCom *et al.* Motion. The Postal Service opposes the PostCom *et al.* Motion because, when balanced, the nature and extent of the likely commercial injury to the Postal Service outweighs the minimal impact that these appendices will have on the public interest in maintaining financial transparency.²

As articulated in the application for non-public treatment filed on March 20, 2017, which was incorporated by reference on March 1, 2018, both Appendix G and Appendix

¹ Motion of PostCom *et al.* for Early Termination of Non-Public Status of Two Documents Filed Under Seal, PRC Docket No. RM2017-3 (Mar. 16, 2018) (hereinafter “PostCom *et al.* Motion”).

² See 39 C.F.R. § 3007.33(a).

A contain information of a commercial nature, which under good business practice would not be publicly disclosed and is not required to be disclosed to the public.³ Moreover, the appendices “reflect internal judgments and assumptions about various sensitive aspects of the Postal Service’s business.”⁴ And the Postal Service does not routinely publicize multi-year forecasts of its financial condition.⁵ These arguments are consistent with 39 C.F.R. § 3007.21(c)(1) and 39 U.S.C. § 410(c).

The application for non-public treatment also identified a number of potential harms if the information was disclosed, including that the public disclosure of non-public information would be used by competitors to the detriment of the Postal Service.⁶ For example, if the charts are disclosed publicly, the Postal Service’s competitors could use (or misuse) the forecasts included in the charts to suggest to customers that the Postal Service is not a financially viable service provider in the long term, which would adversely impact the Postal Service’s ability to compete for future business. The charts are meant to provide two alternative hypothetical scenarios, and they reflect internal business judgments and assumptions. As such, the charts could easily be taken out of context in a manner that could likely cause competitive harm. This is true regardless of the level of aggregation.⁷

³ USPS Application for Non-Public Treatment of Materials, PRC Docket No. RM2017-3 (Mar. 20, 2017) at 1 (citing 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3)) (hereinafter USPS Application).

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.* at 5. The USPS Application includes hypothetical scenarios with respect to this identified harm that are specific to a report by Alvarez and Marsal, the other set of materials to which the USPS Application applied. However, the identified harm is equally applicable to the appendices at issue here.

⁷ The Presiding Officer’s Ruling cited in the PostCom *et al.* Motion is irrelevant here. PostCom *et al.* Motion at 5. That order predates 39 U.S.C. § 504(g) and the Commission’s rules regarding non-public treatment, and the motions practice associated with that ruling related to the relevance of the data at issue, not the appropriateness of non-public treatment. Moreover, the aggregated data the Commission

Contrary to the requirements of 39 C.F.R. § 3007.31(a), the *PostCom et al.* Motion does not contain a “specific and detailed statement justifying why the non-public materials should be made public.” In fact, the motion invokes only the general public interest “in maintaining the financial transparency of a government establishment competing in commercial markets.”⁸ This is insufficient to overcome the presumption that non-public treatment is appropriate.⁹

The focus of the *PostCom et al.* Motion’s argument is that Appendix A forms “a substantial part” of the Postal Service’s support for its position that the supplemental rate authority proposal in Order No. 4258 is insufficient.¹⁰ This is simply not accurate. In its March 1 comments in this proceeding, the Postal Service points out the reasons why the Commission’s proposal is not based on a representative net loss and proposes alternative approaches to determine a more representative net loss. Appendix A is used only to “illustrate the likely impact of the . . . shortcomings” in the Commission’s proposed system, not as an independent basis for those shortcomings.¹¹

As for the Postal Service’s specific proposals for how to set a more accurate baseline, those proposals are rooted in more representative past financial results and the need for reasonable adjustments to the price cap based formula based on factors

ordered the Postal Service to produce in that docket was historical, not forecasted. Presiding Officer’s Ruling No. R97-1/17 (Sept. 11, 1997), at 4.

⁸ *PostCom et al.* Motion at 6 (citing 39 U.S.C. § 504(g)(3)(A)).

⁹ See Presiding Officer’s Ruling Concerning David B. Popkin Motion Number 1, PRC Docket No. N2012-1 (Mar. 6, 2012), at 6.

¹⁰ *PostCom et al.* Motion at 5.

¹¹ Initial Comments of the United States Postal Service in Response to Order No. 4258, PRC Docket No. RM2017-3 (Mar. 1, 2018), at 54.

outside of the Postal Service's control, and not directly on Appendix A.¹² As further explained in the Postal Service's response to ANM *et al.*'s Motion for Issuance of an Information Request (filed on behalf of the same parties filing the motion at issue here), "the Postal Service does not rely on Appendix A to suggest, let alone to propose, that the Commission should design a new system around a future 'test year' or should otherwise rely on projected volumes or costs for purposes of establishing an appropriate revenue target or rate design over the next 5 years."¹³ Thus, the role of Appendix A in the Postal Service's March 1 comments is far from "substantial."¹⁴

The limited public interest is demonstrated not only by the strictly illustrative purpose for which Appendix A (and Appendix G) are being used in the current docket, but also by the fact that very few parties in this proceeding have even sought access to these appendices under protective conditions. The PostCom *et al.* Motion does not articulate why the entire public should have access to the information, given that most commenters did not even seek access to the information previously. Indeed, the fact that so few commenters sought access belies the PostCom *et al.* Motion's assertion that the forecasts are a "central issue" in the proceeding.¹⁵ (That assertion is clearly wide of the mark, since the Commission did not even mention Appendix G in its Order Nos. 4257 and 4258.) Moreover, all parties requesting access to the information were granted such access, consistent with the Commission's protective conditions, which

¹² Response of USPS to ANM *et al.* Motion for Issuance of Information Request, PRC Docket No. RM2017-3 (Mar. 15, 2018), at 3.

¹³ *Id.*

¹⁴ Appendix G likewise did not form a "substantial part" of the basis for either the Postal Service's March 20, 2017, comments or its March 1 comments, the latter of which did not reference Appendix G at all.

¹⁵ PostCom *et al.* Motion at 6.

further counsels in favor of continued non-public treatment.

Finally, the fact that the Postal Service utilized commercially sensitive information in this docket (or any other proceeding) cannot, in and of itself, be a sufficient basis to find a public interest in disclosure of the materials, even if the materials are deemed to be of substantial importance to the Postal Service's position. The Commission procedures under which non-public materials can be accessed under protective conditions ensure that members of the public who wish to examine those materials for their own litigation purposes can do so. This includes the Public Representative, who is tasked by the statute with representing the interests of the general public in Commission proceedings.¹⁶ By articulating no rationale for the disclosure of this information other than to allow the public to assess the Postal Service's position in this proceeding, *PostCom et al.* effectively invite the Commission to set forth a boundless interpretation of the public interest standard, under which the Postal Service must publicly disclose any commercially sensitive material that it uses in its filings with the Commission (at least so long as it is of material importance to the proceeding). However, such a rule would not be based in the statutory and regulatory framework regarding non-public treatment. And such a rule would serve no purpose other than to unreasonably chill the Postal Service's willingness to file comments that provide the Commission with the full panoply of information relevant to a proceeding, to the detriment of the Commission's decision-making processes.

Given the limited public interest in disclosing the charts in the two appendices, particularly when weighed against the potential commercial harm to the Postal Service

¹⁶ 39 U.S.C. § 505.

from disclosure, the appendices should remain under seal. Accordingly, the Postal Service requests that the Commission continue the non-public status of the materials at issue.

Respectfully submitted,
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